

1996

Stste of Utah v. Jeffrey D. Mecham : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 960099

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STATE OF UTAH,

:

Plaintiff and Appellee,

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Case No 960099

vs.

.

KIM MECHAM,

:

Priority No. 2

Defendant and Appellant.

:

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BRIEF OF APPELLANT

APPEAL FROM THE REVOCATION OF PROBATION
OF KIM MECHAM BY THE FIFTH JUDICIAL DISTRICT COURT
THE HONORABLE ROBERT T. BRAITHWAITE PRESIDING

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FILED
Utah Court of Appeals
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Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff and Appellee,	:	Case No. 960099
vs.	:	
KIM MECHAM,	:	Priority No. 2
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A. Judgment, Sentence, Stay of Execution of Sentence and Order of Probation entered November 16, 1994.

B Order dated December 19, 1995

C Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment entered January 4, 1996.

D. Docket, Fifth Judicial District Court, Iron County

TABLE OF AUTHORITIES

Page(s)

Statutes, rules and cases determinative of this appeal are as follows:

Utah Code Annotated, § 77-18-1(12).	
. 6,14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 28, 30.	
<u>Madsen v. Prudential Fed. Sav. & Loan Ass'n</u> , 767 P.2d 538 (Utah 1988).	27.
<u>Nelson v. Jackson</u> , 669 P.2d 1207 (Utah 1983).	30.
<u>Peterson v. Utah Bd. Of Pardons</u> , 277 Utah Adv. Rep. 8 (Utah 1995).	29.
<u>Plumb v. State</u> , 809 P.2d 734 (Utah 1990).	30.
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<u>State v. Hodges</u> , 798 P.2d 270 (Utah Ct. App. 1990).	29.
<u>State v. Moya</u> , 815 P.2d 1312 (Utah Ct.App. 1991).	14, 16, 22.
<u>State v. Rawlings</u> , 893 P.2d 1063 (Utah Ct. App. 1995).	29.
<u>State v. Wilcox</u> , 808 P.2d 1028 (Utah 1991).	1,2,3,4,5,15, 23, 29.
<u>Utah Constitution</u> , Article I, Section 7.	6, 15, 16, 17, 19, 23, 25, 26, 30.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court by Utah Code Annot., § 77-1-6(g), Rule 26, of the Utah Rules of Criminal Procedure and by Rule 3(a), of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review upon this appeal are as follows:

1. Was it error for the trial court to revoke the probation of the Defendant, Kim Mecham, without prior notice to him that revocation of probation was one of the issues before the court? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below.

2. Was it error for the trial court to revoke the probation of Kim Mecham and commit him to jail without giving Kim Mecham timely and proper notice of the revocation hearing? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the

issues below.

3. Was it error for the trial court to revoke the probation of Kim Mecham and commit him to jail without permitting him an opportunity to address the trial court? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below. The issue is partially preserved at TR. P. 13, 1.1.

4. Was it error for the trial court to revoke the probation of Kim Mecham and commit him to jail without permitting him the opportunity to present evidence? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below although the defendant's counsel made attempts he was cut-off by the Court or otherwise not permitted to speak.

5. Should the trial court have had ex-parte contact with Scott Burns regarding the Defendant, Kim Mecham? Whether the trial court had authority to revoke Kim Mecham's probation following ex-parte contact with a witness is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v.

Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below. A portion of the issue is preserved in the record at TR. p. 4, l. 8-10.

6. Should the trial court have had ex-parte contact with Dr. Roby of ISAT, and refused to permit Kim Mecham the opportunity to cross-examine Roby? Whether the trial court had authority to revoke Kim Mecham's probation following ex-parte contact with a witness is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below. A portion of the issue is preserved in the record at TR. p. 4, l. 8-10.

7. Should the trial judge have recused himself upon the Defendant's request because of ex-parte contact with Mr. Burns and Dr. Roby? Whether the trial court had authority to revoke Kim Mecham's probation following ex-parte contact with a witness is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below. A portion of the issue is preserved in the record at TR. p. 4, l. 8-10.

8. Were Kim Mecham's rights of due process under the Utah Constitution violated? Whether the trial court had authority to revoke Kim Mecham's probation is a question

of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below.

9. Did the trial court comply with the provisions of Utah Code Annotated, § 77-18-1(12), et seq.? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below.

10. Should the trial court have revoked the probation of Kim Mecham? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below although this issue was preserved in part at TR. p. 13, l.1.

11. Had Kim Mecham's probation been terminated where there was no order extending his probation beyond twelve (12), months? Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are

given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The trial court did not permit the defendant, Kim Mecham, nor his counsel, to preserve the issue because it did not permit the defendant, nor his counsel, the opportunity to speak, present evidence and argue the issues below.

STANDARD OF REVIEW

1. Whether the trial court had authority to revoke Kim Mecham's probation is a question of law and conclusions of law by the trial court are given no particular deference and shall be reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution, Article I, Section 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Annotated, Section 77-18-1(12).

(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

STATEMENT OF THE CASE

The Defendant, Kim Mecham, was charged by an Information filed in the Fifth Judicial District Court of Iron County within the State of Utah, with Rape, a first degree felony in violation of Utah Code Annotated, § 76-5-402, on or about September 1, 1994.

On November 7, 1994, the Kim Mecham pleaded no contest to Assault, a Class B misdemeanor.

Kim Mecham was sentenced by the trial court to incarceration in the Iron County Jail for a period of thirty (30), days, together with a fine of Three Hundred Dollars (\$300.00). Execution of the sentence was stayed and Kim Mecham was place on probation for a period of twelve (12), months under certain terms and provisions. One of the conditions of probation was that the Defendant shall enroll in and complete a mental health evaluation (within 45 days) and thereafter shall pay for and successfully complete any program recommended pursuant to the evaluation.

The case was set for review on October 24, 1995.

On October 24, 1995, Kim Mecham and his counsel appeared at the review hearing. The Defendant's counsel informed the trial court that Kim Mecham had obtained the psychological evaluation ordered and that it had been performed at the Intermountain Sexual Abuse Treatment Center (ISAT), and that he and Kim Mecham had made several attempts to obtain a copy of the Psychological Evaluation from Dr. Roby, a psychologist for ISAT, but had been unable to do so. The prosecution had also attempted to obtain the Psychological Evaluation without success nor had one been filed with the trial court. Dr. Roby had failed to produce the evaluation to anyone.

On December 19, 1995, Kim Mecham and his counsel appeared for the review hearing, and the State of Utah was represented by Scott M. Burns, the Iron County Attorney. When the court called the case the court stated that the case is set for a review because if Mr. Mecham has complied with the terms of probation, that the matter should be dismissed and, if he hasn't he's to go to jail.

Without allowing the Defendant, Kim Mecham, nor his counsel an opportunity to be heard or present evidence the trial court revoked probation and ordered Kim Mecham remanded forthwith into custody to serve the thirty (30), day jail sentence.

On December 19, 1995, the trial court entered a written Order making certain findings, revoking the probation and committing Kim Mecham to the Iron County Jail.

On January 4, 1996, the trial court executed and entered an Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment.

Kim Mecham filed his Notice of Appeal on the 1st day of February, 1996, after serving thirty (30), days in the Iron County Jail.

STATEMENT OF THE FACTS

The Defendant, Kim Mecham, was charged by an Information filed in the Fifth Judicial District Court of Iron County within the State of Utah, with Rape, a first degree felony in violation of Utah Code Annotated, § 76-5-402, on or about September 1, 1994. (R. 1-2).

On November 7, 1994, the Kim Mecham pleaded no contest to Assault, a Class B misdemeanor.

Kim Mecham was sentenced by the trial court to incarceration in the Iron County Jail for a period of thirty (30), days, together with a fine of Three Hundred Dollars (\$300.00). Execution of the sentence was stayed and Kim Mecham was place on probation for a period of twelve (12), months under certain terms and provisions. One of the conditions of probation was that the Defendant shall enroll in and complete a mental health evaluation (within 45 days) and thereafter shall pay for and successfully complete any program recommended pursuant to the evaluation. (R. 52-55, Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation.)

The case was set for review on October 24, 1995. (R. 54).

On October 24, 1995, Kim Mecham and his counsel appeared at the review hearing. The Defendant's counsel informed the trial court that Kim Mecham had obtained the psychological evaluation ordered and that it had been performed at the Intermountain Sexual Abuse Treatment Center (ISAT), and that he and Kim Mecham had made several attempts to obtain a copy of the Psychological Evaluation from Dr. Roby, a psychologist for ISAT, but had been unable to do so. The prosecution had also attempted to obtain the Psychological Evaluation without success nor had one been filed with the trial court. Dr. Roby had failed to produce the

evaluation to anyone. (TR. p.6, l.12-p.7, l.11; p.8,l.19-24; p.9, l.21- p.10, l.2.)

The trial court continued the hearing for two weeks, until November 7, 1995, stating that Dr. Roby would be required to put his position in writing so that the Defendant and his counsel could respond to it. (TR. p.8, l.25- p.10. l.5.) The trial court's docket reflects that a Notice of Setting for the review hearing on November 7, 1995, was mailed to Kim Mecham's counsel but was returned without delivery on November 2, 1995. (Addendum D.)

The Defendant's counsel, on November 6, 1995, requested a continuance of that hearing to December 5, 1995, which was granted by the court. (Addendum D.) On December 4, 1995, Kim Mecham's counsel requested a continuance of the review hearing because his wife had been placed in the hospital. Kim Mecham and his counsel did not appear and the review was continued to December 19, 1995. The trial court docket reflects that the Notice of this hearing was returned to the trial court through the mail. The Defendant's counsel was notified by the trial court clerk of the date of the review hearing on December 14, 1995, by telephone five (5), calendar days prior to the scheduled hearing. The docket of the trial court shows the Notice of Setting of the review hearing was again returned to the court through the mail on December 12, 1995. (Addendum D.)

On December 19, 1995, Kim Mecham and his counsel appeared for the review hearing, and the State of Utah was represented by Scott M. Burns, the Iron County Attorney. When the court called the case the court stated that the case is set for a review because if Mr. Mecham has complied with the terms of probation, that the matter should be dismissed and, if he hasn't he's to go to jail. (TR.p.3, l.1-9).

The trial court indicated that it had contact with Dr. Roby of ISAT telephonically and was concerned that counsel had lied to the court on October 24, 1995, at the first review hearing. (TR. p.3, l. 9-13.) The court asked counsel what he had told the court about ISAT, and counsel for Mr. Mecham responded that Mr. Mecham had gone to ISAT and had an evaluation by Dr. Roby and that he had called Dr. Roby's office in attempts to obtain the evaluation but had not received it. (TR. p.3, l.16-21.) The Defendant's counsel told the court that a fax from Dr. Roby was received by him on October 24, 1994, upon his return to his office from the court. (TR. p.3, l. 18, through p.4, l. 24.)

At this time Kim Mecham's counsel moved that the judge recuse himself because of ex-parte contact with Mr. Burns, the State's attorney, and Dr. Roby, the psychologist who performed the evaluation of the Defendant, Kim Mecham. The judge interrupted counsel in mid-statement and stated that he had called Dr. Roby who had told him that he had sent a fax to the Defendant's counsel the day before, on October 23, 1995. Counsel replied that he had not received the evaluation (fax) until the day he returned to his office following the review hearing on October 24, 1995. (TR. p.4, l.8-23.) The evaluation was faxed to the Defendant's counsel on October 23, 1995, but was not received Defendant's counsel until October 24, 1995, following the review hearing when the Defendant's counsel returned to his office. (TR. p.19, l.10-23.)

Dr. Roby had sent a letter dated October 24, 1995, to Mr. Burns. Counsel for Kim Mecham was first presented with the letter from Roby by Burns at the hearing on December 19, 1995. (TR. p.10 l.10-23.) Although acknowledging that the Kim Mecham and his counsel had not received the faxed evaluation until at least October 23, 1995, the Iron County Attorney requested that Mr. Mecham be committed to jail for 30 days because he had not completed the

treatment recommended by Dr. Roby in his evaluation. (TR. p.11, 1.9-20.)

The court inquired whether Kim Mecham had completed his therapy by the 24th of October, 1995. Counsel for Kim Mecham stated that the Defendant could not have completed the treatment recommended by the evaluation of Dr. Roby because the Defendant, Kim Mecham, and his counsel had only received the evaluation which called for treatment, on October 24, 1995, and that Mrs. Mecham, who was present, had made requests for the evaluation of Dr. Roby. (TR. p.12, 1.6-25 through p.13, 1.1-7.)

The court inquired whether Kim Mecham made any requests after paying the fee of \$700.00, but allowed no response by the Defendant and his counsel. (TR. p.13, 1.8-11.) The judge then stated that he had heard enough on the case and committed the Defendant, Kim Mecham, to the Iron County Jail for thirty (30), days and ordered him to pay any of the costs incurred for counseling at ISAT. (TR. p.13, 1.11-16.)

Counsel for the Defendant, Kim Mecham, attempted to offer further evidence and argument. The court interrupted the defendant's counsel and stated that the defendant's counsel scrambled to keep Kim Mecham out of jail, lied to the court and delayed things. (TR. p.13, 1.17-21.)

Kim Mecham, the Defendant, then requested that the court permit him to speak. The court refused Kim Mecham the opportunity to speak at the review hearing. (TR.p.13. 1.22-23.)

Counsel for Kim Mecham requested the opportunity to present evidence and other arguments at the review hearing but the trial court ignored the request to present evidence and arguments, shut off the video recording record of the proceeding, stood up and left the bench

while counsel for the Defendant was in mid-sentence. (1R.p.13, l.25). Evidence from Dr. Kim M. Bateman, M.D., who had also examined Kim Mecham, the testimony of the Defendant, Kim Mecham, and the testimony of the Defendant's wife, Kay Mecham, and other documentary evidence would have been presented if the trial court had permitted the defendant his right of due process.

Without allowing the Defendant, Kim Mecham, nor his counsel an opportunity to be heard or present evidence the trial court revoked probation and ordered Kim Mecham remanded forthwith into custody to serve the thirty (30), day jail sentence.

On December 19, 1995, the trial court entered a written Order making certain findings, revoking the probation and committing Kim Mecham to the Iron County Jail. This Order bears a mailing certificate to the Defendant's counsel, Andrew B Berry, at the address of 3540 South 4000 West, Suite 400, West Valley City, Utah, 84120, a business address that the Defendant's counsel had not had since 1988. (R. 72-73). Order of December 19, 1995. Addendum B, hereto.) The trial court's docket reveals that this Order was returned to the trial court on December 27, 1995, marked not at this address, but was remailed to the Defendant's counsel on January 3, 1996, at his present address. (See Addendum D, and the attached envelope from the Fifth District Court bearing a mailing post mark of January 5, 1996.)

On January 4, 1996, the trial court executed and entered an Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment, submitted by the State's attorney, Mr. Scott Burns. The order bears no mailing certificate to the Defendant, Kim Mecham, nor his counsel. The order was mailed to the defendant's counsel by the Iron County Attorney on January 10, 1996, as is shown by the

envelope attached to Addendum C, bearing a post mark date of January 10, 1996. (R. 74-77, Addendum C.)

The record is devoid of notice to the Defendant, Kim Mecham, and his counsel, of the issues which were to be considered at the review hearing on December 19, 1995. The record is devoid of any timely and proper notice to the Defendant, Kim Mecham, or his counsel of the hearing date. The record is devoid of affidavit, order to show cause, or any other document, required by Utah Code Annotated, Section 77-18-1(12), which may have given Kim Mecham timely and proper notice that his probation was to be revoked, that he may be incarcerated, ordered to pay restitution, his purported failure to complete a recommended treatment program, nor the consideration of any of the other issues at the hearing. (R. 1-80.)

Kim Mecham filed his Notice of Appeal on the 1st day of February, 1996, after serving thirty (30), days in the Iron County Jail.

SUMMARY OF ARGUMENT

A probationer, and the Defendant here, Kim Mecham, is entitled to written notice of the grounds on which revocation of probation is sought by the State of Utah. State v. Cowdell, 626 P.2d 487 (Utah 1981). Moreover, notice of probation proceedings within the probation period is required in order to revoke a defendant's probation. Smith v. Cook, 803 P.2d 788 (Utah 1990). Probation may not be retroactively revoked no matter how clear it subsequently appears that the conditions of probation were not complied with if no enforcement action is taken prior to the elapse of the term of probation. State v. Moya, 815 P.2d 1312 (Utah Ct. App. 1991).

In the instant case the trial court's record reveals that no affidavit alleging with

particularity facts asserted to constitute a violation of the conditions of probation was filed with the trial court. No determination was made whether an affidavit established probable cause to believe that revocation, modification, or extension of probation was justified.

No copy of an affidavit and an order to show cause why the Defendant's probation should not be revoked was filed in the trial court nor were such documents served upon the Defendant, Kim Mecham. The trial court's record contains no such required affidavit nor order to show cause nor proof of service of such documents on Kim Mecham. There was no notice of probation proceedings to Kim Mecham within the probationary period which is required to revoke, or extend, a defendant's probation. Moreover, Kim Mecham's probation may not be retroactively revoked if no enforcement action is taken prior to the elapse of the term of probation.

The Defendant, Kim Mecham, was not provided any notice that a probation revocation proceeding was pending against him depriving him of his right of due process under the Utah Constitution, Article I, Section 7. He was not apprised of his rights under Utah Code Annotated, Section 77-18-1(12), nor afforded any of the protections mandated by the legislature in probation revocation proceedings. Whether the trial court had the proper authority to revoke Kim Mecham's probation is a question of law and the trial court's conclusions of law are afforded no particular deference and are reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The revocation of Kim Mecham's probation should be reversed because the State failed to file an affidavit alleging with particularity facts asserted to constitute a violation of his probation, the court failed to make a determination that the affidavit established probable cause to believe that revocation, modification, or extension of probation is justified and the State of Utah and the trial court failed to cause Kim Mecham to be served with a copy of the affidavit and order

to show cause. The trial court acted beyond its authority when it revoked the defendant's probation on December 19, 1995, beyond the defendant's probationary period, without an order extending the probation. Moya, id.

Because there was not an affidavit nor an order to show cause filed nor served upon the defendant, Kim Mecham, he was not properly notified of a hearing upon an order to show cause, nor a time and place therefor, nor was he served at least five days prior to the hearing. The defendant, Kim Mecham, was not informed by an order of his right to present evidence. The trial court, and the State of Utah, failed to comply with the provisions of Utah Code Annotated, Section 77-18-1(12), and the revocation of the probation of Kim Mecham should be reversed.

Without allowing the Defendant, Kim Mecham, nor his counsel an opportunity to be heard or present evidence the trial court revoked probation and ordered Kim Mecham remanded forthwith into custody to serve the thirty (30), day jail sentence.

The trial court's refusal to permit the Defendant, Kim Mecham, to address the court deprived Kim Mecham of his right to due process as guaranteed by the Utah Constitution, Article I, Section 7, and violated the requirements of Utah Code Annotated, Section 77-18-1(12)(c)(iv), and (d)(iv).

Kim Mecham was entitled to call witnesses, appear and speak in his own behalf, and present evidence. Despite his request to address the trial court, his right of due process and the mandate of subsection (d)(iv), the trial court refused to allow Kim Mecham to speak to the court, call witnesses and present evidence on his own behalf. The trial court's refusal to permit Kim Mecham to speak, call witnesses and present evidence on his own behalf is error and the

revocation of the Defendant's probation should be reversed by this Court.

The State of Utah did not present evidence upon the allegations of an affidavit, other than the letter dated October 24, 1995, from Dr. Roby. The first time the defendant and his counsel were apprised of the existence of the letter was at the hearing of December 19, 1995. No witnesses were presented as mandated by the statute and the defendant, Kim Mecham, was not permitted to question witnesses.

The failure of the trial court to require the presentation of evidence against the defendant, Kim Mecham, and permit him to cross-examine the witnesses against him was error. This failure was in violation of Kim Mecham's right of due process under the Utah Constitution, Article I, Section 7, and his statutorily mandated rights under Utah Code Annotated, Section 77-18-1(12)(d)(ii), and (d)(iii), and the revocation of the defendant's probation without fulfilling these requirements, and protecting these rights, is grounds for reversal of the probation revocation of Kim Mecham.

The failure of the trial court to stay the proceedings and consider the defendant's request for recusal when bias against the defendant and his counsel is apparent was error. When a defendant establishes that the sentencing judge based his sentence upon inaccurate or unreliable information received during an ex parte communication that was not disclosed to the defendant previously, resentencing may be necessary. State v. Gomez, 887 P.2d 853 (Utah 1994). This is reflected by the trial court's repeated interruptions of the defendant's counsel, the refusal to entertain witnesses and the defendant's evidence and permit the defendant cross-examination of the

witnesses against him and the incarceration of the defendant despite the court's failure to comply with the mandates of Utah Code Annotated, Section 77-18-1(12). The revocation of the probation of the defendant, Kim Mecham, should be reversed.

The trial court committed reversible error when it revoked the probation of the Defendant, Kim Mecham, regardless of whether it believed that the defendant's counsel had misrepresented to the court the date on which he received the faxed evaluation and recommendations for treatment of Dr. Roby. Although it was disputed whether the defendant's counsel received the faxed evaluation and recommendations for treatment on October 23, 1995, or October 24, 1995, it is undisputed that the evaluation and recommendations for treatment were not faxed to the defendant's counsel until October 23, 1995, the day before the hearing on the defendant's violation of the terms and conditions of probation.

ARGUMENT

THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENDANT PRIOR AND PROPER NOTICE OF THE REVOCATION OF HIS PROBATION WAS IN VIOLATION OF HIS RIGHT OF DUE PROCESS AND UCA SECTION 77-18-1(12)

The failure of the trial court to give the defendant prior and proper notice of the revocation of his probation was in violation of his right of due process under Article I, Section 7, of the Utah Constitution and the legislated rights granted him under Utah Code Annotated, Section 77-18-1(12).

The Utah Constitution, Article I, Section 7, provides that no person shall be deprived of life, liberty or property without due process of law. A defendant is denied his due process right to notice of the grounds on which revocation of his probation is sought where the defendant has not notice of the grounds upon which the state and court will rely upon to revoke his probation. State v. Cowdell, 626 P.2d 487 (Utah 1981).

The Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation entered by the trial court on November 16, 1994, provided that the Defendant, Kim Mecham, was placed on probation for a period of twelve (12) months, under the supervision of the Court (Bench Probation) strictly within certain terms and provisions which included, at paragraph three, the requirement that Kim Mecham enroll in and complete a mental health evaluation (within 45 days) and thereafter pay for and successfully complete any program recommended pursuant to the evaluation. The matter was set for review on October 24, 1995. (R. 52-55.)

On October 24, 1995, Kim Mecham and his counsel appeared at the review hearing. The Defendant's counsel informed the trial court that Kim Mecham had obtained the psychological evaluation ordered by the court and that it had been performed at the Intermountain

Sexual Abuse Treatment Center (ISAT), and that he and Kim Mecham had made several attempts to obtain a copy of the Psychological Evaluation from Dr. Roby, a psychologist for ISAT, but had been unable to do so. The prosecution had also attempted to obtain the Psychological Evaluation without success nor had one been filed with the trial court. Dr. Roby had failed to produce the evaluation to anyone. (TR. p.6, l.12-p.7, l.11, p.8,l.19-24; p.9, l.21- p.10, l.2.)

The trial court continued the hearing for two weeks, until November 7, 1995, stating that Dr. Roby would be required to put his position in writing so that the Defendant and his counsel could respond to it. (TR. p.8, l.25- p.10, l.5.) The trial court's docket reflects that a Notice of Setting for the review hearing on November 7, 1995, was mailed to Kim Mecham's counsel but was returned without delivery on November 2, 1995. (Addendum D.)

The Defendant's counsel, on November 6, 1995, requested a continuance of that hearing to December 5, 1995, which was granted by the court. (Addendum D.) On December 4, 1995, Kim Mecham's counsel requested a continuance of the review hearing because his wife had been placed in the hospital. Kim Mecham and his counsel did not appear and the review was continued to December 19, 1995. The trial court docket reflects that the Notice of this hearing was returned to the trial court through the mail. The Defendant's counsel was notified by the trial court clerk of the date of the review hearing on December 14, 1995, by telephone five (5), calendar days prior to the scheduled hearing. The docket of the trial court shows the Notice of Setting of the review hearing was again returned to the court through the mail on December 12, 1995. (Addendum D.)

On December 19, 1995, Kim Mecham and his counsel appeared for the review hearing, and the State of Utah was represented by Scott M. Burns, the Iron County Attorney.

When the court called the case the court stated that the case is set for a review because if Mr. Mecham has complied with the terms of probation, that the matter should be dismissed and, if he hasn't he's to go to jail. (TR.p.3, 1.1-9). This was the first notice to Kim Mecham and his counsel that his probation may be revoked and that he may be jailed for violation of paragraph three (3), of the Order of Probation.

Utah Code Annotated, Section 77-18-1(12)(a), provides that probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. It provides that probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

Utah Code Annotated, Section 77-18-1(12)(b), provides that an affidavit alleging with particularity the facts asserted to constitute violation of the probation must be filed and that the court that authorized the probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. Subsection (ii), provides that if the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause wh his probation should not be revoked, modified, or extended.

Utah Code Annotated, Section 77-18-1(12)(c), provides that the order to show cause shall spccify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing and inform the defendant of a right to present evidence.

The trial court record is devoid of any notice whatsoever to the Defendant, Kim Mecham, and his counsel, of the issues which were to be considered at the review hearing on December 19, 1995. The record is devoid of any timely and proper notice to the Defendant, Kim Mecham, or his counsel of the hearing date. The record is devoid of affidavit, order to show cause, or any other document, required by Utah Code Annotated, Section 77-18-1(12), which may have given Kim Mecham timely and proper notice that his probation was to be revoked, that he may be incarcerated, ordered to pay restitution, his purported failure to complete a recommended treatment program, nor the consideration of any of the other issues at the hearing. (R. 1-77.)

A probationer, and the Defendant here, Kim Mecham, is entitled to written notice of the grounds on which revocation of probation is sought by the State of Utah. State v. Cowdell, 626 P.2d 487 (Utah 1981). Moreover, notice of probation proceedings within the probation period is required in order to revoke a defendant's probation. Smith v. Cook, 803 P.2d 788 (Utah 1990). Probation may not be retroactively revoked no matter how clear it subsequently appears that the conditions of probation were not complied with if no enforcement action is taken prior to the elapse of the term of probation. State v. Moya, 815 P.2d 1312 (Utah Ct. App. 1991).

In the instant case the trial court's record reveals that no affidavit alleging with particularity facts asserted to constitute a violation of the conditions of probation was filed with the trial court. No determination was made whether an affidavit established probable cause to believe that revocation, modification, or extension of probation was justified.

No copy of an affidavit and an order to show cause why the Defendant's probation should not be revoked was filed in the trial court nor were such documents served upon the

Defendant, Kim Mecham. The trial court's record contains no such required affidavit nor order to show cause nor proof of service of such documents on Kim Mecham. There was no notice of probation proceedings to Kim Mecham within the probationary period which is required to revoke, or extend, a defendant's probation. Moreover, Kim Mecham's probation may not be retroactively revoked if no enforcement action is taken prior to the elapse of the term of probation.

The Defendant, Kim Mecham, was not provided any notice that a probation revocation proceeding was pending against him depriving him of his right of due process under the Utah Constitution, Article I, Section 7. He was not apprised of his rights under Utah Code Annotated, Section 77-18-1(12), nor afforded any of the protections mandated by the legislature in probation revocation proceedings. Whether the trial court had the proper authority to revoke Kim Mecham's probation is a question of law and the trial court's conclusions of law are afforded no particular deference and are reviewed for correctness. State v. Wilcox, 808 P.2d 1028, 1031 (Utah 1991). The revocation of Kim Mecham's probation should be reversed because the State failed to file an affidavit alleging with particularity facts asserted to constitute a violation of his probation, the court failed to make a determination that the affidavit established probable cause to believe that revocation, modification, or extension of probation is justified and the State of Utah and the trial court failed to cause Kim Mecham to be served with a copy of the affidavit and order to show cause. The trial court acted beyond its authority when it revoked the defendant's probation on December 19, 1995, beyond the defendant's probationary period, without an order extending the probation. Moya, id.

Because there was not an affidavit nor an order to show cause filed nor served upon the defendant, Kim Mecham, he was not properly notified of a hearing upon an order to

show cause, nor a time and place therefor, nor was he served at least five days prior to the hearing. The defendant, Kim Mecham, was not informed by an order of his right to present evidence. The trial court, and the State of Utah, failed to comply with the provisions of Utah Code Annotated, Section 77-18-1(12), and the revocation of the probation of Kim Mecham should be reversed.

THE FAILURE OF THE TRIAL COURT TO PERMIT THE DEFENDANT TO
ADDRESS THE COURT AND PRESENT EVIDENCE AND ARGUMENT WAS IN
VIOLATION OF HIS RIGHT OF DUE PROCESS AND UCA SECTION 77-18-1(12)

The court inquired whether Kim Mecham had completed his therapy by the 24th of October, 1995. Counsel for Kim Mecham stated that the Defendant could not have completed the treatment recommended by the evaluation of Dr. Roby because the Defendant, Kim Mecham, and his counsel had only received the evaluation which called for treatment, on October 24, 1995, and that Mrs. Mecham, who was present, had made requests for the evaluation of Dr. Roby. (TR. p.12, 1.6-25 through p.13, 1.1-7.)

The court inquired whether Kim Mecham made any requests after paying the fee of \$700.00, but allowed no response by the Defendant nor his counsel. (TR. p.13, 1.8-11.) The judge then stated that he had heard enough on the case and committed the Defendant, Kim Mecham, to the Iron County Jail for thirty (30), days and ordered him to pay any of the costs incurred for counseling at ISAT (TR p 13, 1.11-16)

Counsel for the Defendant, Kim Mecham, attempted to offer further evidence and argument. The court interrupted the defendant's counsel and stated that the defendant's counsel scrambled to keep Kim Mecham out of jail, lied to the court and delayed things. (TR. p.13, 1.17-21.)

Kim Mecham, the Defendant, then requested that the court permit him to speak. The court refused Kim Mecham the opportunity to speak at the review hearing. (TR.p.13. 1.22-23.)

Counsel for Kim Mecham requested the opportunity to present evidence and other arguments at the review hearing but the trial court ignored the request to present evidence and arguments, shut off the video recording record of the proceeding, stood up and left the bench while counsel for the Defendant was in mid-sentence. (TR.p.13, 1.25.)

Without allowing the Defendant, Kim Mecham, nor his counsel an opportunity to be heard or present evidence the trial court revoked probation and ordered Kim Mecham remanded forthwith into custody to serve the thirty (30), day jail sentence.

The trial court's refusal to permit the Defendant, Kim Mecham, to address the court deprived Kim Mecham of his right to due process as guaranteed by the Utah Constitution, Article I, Section 7, and violated the requirements of Utah Code Annotated, Section 77-18-1(12)(c)(iv), and (d)(iv).

Kim Mecham was entitled to call witnesses, appear and speak in his own behalf, and present evidence. Despite his request to address the trial court, his right of due process and the mandate of subsection (d)(iv), the trial court refused to allow Kim Mecham to speak to the court, call witnesses and present evidence on his own behalf. The trial court's refusal to permit Kim Mecham to speak, call witnesses and present evidence on his own behalf is error and the revocation of the Defendant's probation should be reversed by this Court.

THE FAILURE OF THE TRIAL COURT TO REQUIRE THE PRESENTATION OF
EVIDENCE AGAINST THE DEFENDANT AND PERMIT THE DEFENDANT TO
CROSS-EXAMINE THE WITNESSES AGAINST HIM WAS ERROR

On December 19, 1995, at the hearing upon the question of whether the Defendant, Kim Mecham, had met the conditions of his probation the trial court failed to require the State of Utah to present evidence on the allegations of the affidavit as required by Utah Code Annotated, Section 77-18-1(12)(d)(ii). Moreover, subsection (d)(iii), of the statute requires that the persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant.

The State of Utah did not present evidence upon the allegations of an affidavit, other than the letter dated October 24, 1995, from Dr. Roby. The first time the defendant and his counsel were apprised of the existence of the letter was at the hearing of December 19, 1995. No witnesses were presented as mandated by the statute and the defendant, Kim Mecham, was not permitted to question witnesses.

The failure of the trial court to require the presentation of evidence against the defendant, Kim Mecham, and permit him to cross-examine the witnesses against him was error. This failure was in violation of Kim Mecham's right of due process under the Utah Constitution, Article I, Section 7, and his statutorily mandated rights under Utah Code Annotated, Section 77-18-1(12)(d)(ii), and (d)(iii), and the revocation of the defendant's probation without fulfilling these requirements, and protecting these rights, is grounds for reversal of the probation revocation of Kim Mecham.

THE FAILURE OF THE TRIAL COURT TO CONSIDER THE
DEFENDANT'S MOTION FOR IT'S RECUSAL BECAUSE OF EXPARTE
CONTACT WITH DR. ROBY AND MR. BURNS WAS ERROR

The Defendant's counsel, when it became apparent that the trial court had ex-parte contact with Dr. Roby and the State's attorney, Scott Burns, and appeared to be biased, moved that the trial court recuse himself from further hearing of the matter. (TR.p.4, 1.8-10.) The trial court interrupted the defendant's counsel in mid-sentence and did not permit him to place on the record the reasons the defendant was requesting recusal of the judge. Timeliness is essential in filing a motion to disqualify. To be timely a motion to disqualify should be filed at counsel's first opportunity after learning of the disqualifying facts. Madsen v. Prudential Fed. Sav. & Loan Ass'n., 767 P.2d 538 (Utah 1988).

The defendant's counsel first learned of disqualifying facts at the hearing on December 19, 1995, and, at his first opportunity, immediately moved for recusal of the trial court. The trial court had ex-parte contact with the State's attorney, Scott Burns, and with Dr. Roby, the psychologist who performed the evaluation on the Defendant and who asserted ex-parte to the trial court that he had previously delivered the psychological evaluation to the Defendant and his counsel, that the Defendant, Kim Mecham, had not completed treatment, and who asserted that Kim Mecham had not paid for the evaluation. (TR. p.3, 1.3 through p.4, 1. 19; p.10, 1.10 through p.13, 1.25.)

The trial court, on December 19, 1995, demonstrated it's bias and the defendant immediately moved for disqualification of the judge. The request was ignored, despite the court's ex-parte contact with the witness against Mr. Mecham who asserted that he had provided the evaluation to the defendant's counsel and that the defendant had not completed any treatment.

The failure of the trial court to stay the proceedings and consider the defendant's request for recusal when bias against the defendant and his counsel is apparent was error. When a defendant establishes that the sentencing judge based his sentence upon inaccurate or unreliable information received during an ex parte communication that was not disclosed to the defendant previously, resentencing may be necessary. State v. Gomez, 887 P.2d 853 (Utah 1994) This is reflected by the trial court's repeated interruptions of the defendant's counsel, the refusal to entertain witnesses and the defendant's evidence and permit the defendant cross-examination of the witnesses against him and the incarceration of the defendant despite the court's failure to comply with the mandates of Utah Code Annotated, Section 77-18-1(12). The revocation of the probation of the defendant, Kim Mecham, should be reversed.

THE TRIAL COURT ABUSED IT'S DISCRETION BY REVOKING THE DEFENDANT'S PROBATION

The trial court committed reversible error when it revoked the probation of the Defendant, Kim Mecham, regardless of whether it believed that the defendant's counsel had misrepresented to the court the date on which he received the faxed evaluation and recommendations for treatment of Dr. Roby. Although it was disputed whether the defendant's counsel received the faxed evaluation and recommendations for treatment on October 23, 1995, or October 24, 1995, it is undisputed that the evaluation and recommendations for treatment were not faxed to the defendant's counsel until October 23, 1995, the day before the hearing on the defendant's violation of the terms and conditions of probation.

The court inquired whether Kim Mecham had completed his therapy by the 24th of October, 1995. Counsel for Kim Mecham stated that the Defendant could not have completed the

treatment recommended by the evaluation of Dr. Roby because the Defendant, Kim Mecham, and his counsel had only received the evaluation which called for treatment, on October 24, 1995, and that Mrs. Mecham, who was present, had made requests for the evaluation of Dr. Roby. (TR. p.12, 1.6-25 through p.13, 1.1-7.)

The standard of proof to be used in proving a violation of a condition of probation is a preponderance of the evidence. State v. Hodges, 798 P.2d 270 (Utah Ct. App. 1990).

Despite the fact that the trial court mistakenly concluded that the Defendant's counsel had received the faxed psychological evaluation from Dr. Roby at ISAT on October 23, 1995, and not October 24, 1995, as asserted by the defendant's counsel, the defendant could not have completed the treatment recommended by October 24, 1995, in either case. To support a revocation of the defendant's probation, the violation of the probation condition of the defendant must be willful or, if not willful, must presently threaten the safety of society. There was no evidence presented that the defendant, Kim Mecham, willfully violated the condition of his probation that he successfully complete any program recommended pursuant to the evaluation. He could not have successfully completed the treatment recommended by the evaluation of Dr. Roby at ISAT, because he (and his counsel) had not received the evaluation until October 24, 1995. The preponderance of the evidence is that the faxed evaluation, recommending treatment, was not received by the Defendant prior to October 23, 1995.

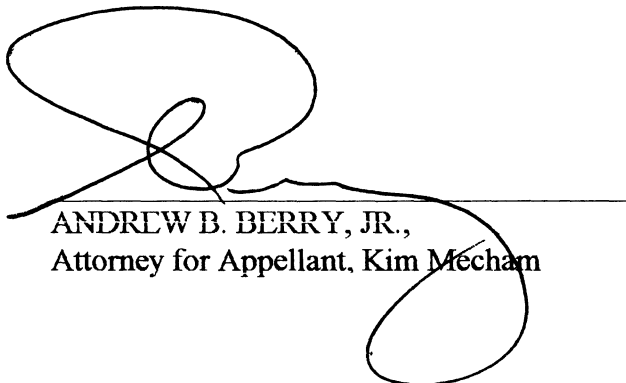
The trial court was incorrect when it revoked the probation of the defendant, Kim Mecham, and committed him to serve thirty (30), days in the Iron County Jail and the judgment revoking the probation of the defendant, Kim Mecham, should be reversed. Wilcox, id.; See also: State v. Rawlings, 893 P.2d 1063 (Utah Ct. App. 1995); Petersen v. Utah Bd. of Pardons, 277

Utah Adv. Rep. 8 (Utah 1995); Smith v. Cook, 803 P.2d 788, 794 (Utah 1990); Nelson v. Jackson, 669 P.2d 1207 (Utah 1983); and Plumb v. State, 809 P.2d 734 (Utah 1990).

CONCLUSION

The order of the trial court revoking the probation of the Defendant, Kim Mecham, in violation of his right of due process as guaranteed by the Utah Constitution, Article I, Section 7, and Utah Code Annotated, Section 77-18-1(12), should be reversed.

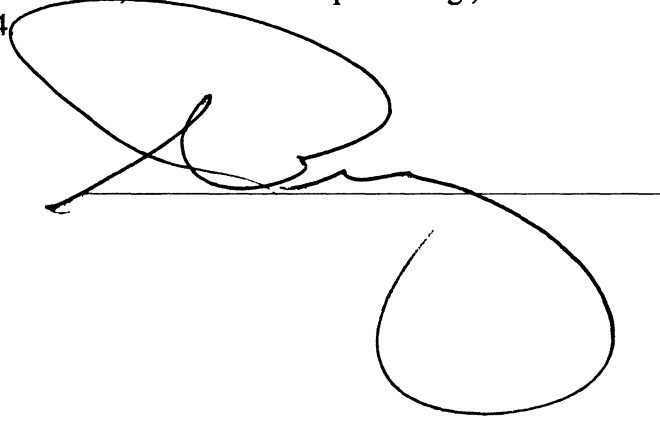
RESPECTFULLY SUBMITTED this 21st day of January, 1997.



ANDREW B. BERRY, JR.,
Attorney for Appellant, Kim Mecham

CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on this 21st day of January, 1997, I mailed, postage prepaid and by first class mail, true and correct copies of the foregoing Brief of Appellant, to Christine Soltis, Assistant Attorney General for the State of Utah, at 236 State Capitol Bldg., Post Office Box 140854, Salt Lake City, Utah 84114-0854.



ADDENDUM

A. Judgment, Sentence, Stay of Execution of Sentence and Order of Probation entered November 16, 1994.

B. Order dated December 19, 1995.

C. Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment entered January 4, 1996.

D. Docket, Fifth Judicial District Court, Iron County

SCOTT M. BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694

FILED
FIFTH DISTRICT COURT

'94 NOV 16 AM 10 35

IRON COUNTY

BY

JS

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

KIM W. MICHAM,

Defendant.

) JUDGMENT, SENTENCE, STAY
) OF EXECUTION OF SENTENCE,
) AND ORDER OF PROBATION

) Criminal No. 941500733

) Judge Robert T. Braithwaite

The Defendant, KIM W. MICHAM, having entered a plea of guilty to the offense of ASSAULT, a Class B Misdemeanor, on November 7, 1994, and the Court having accepted said plea of guilty, and thereafter having called the above-entitled matter on for sentencing on November 7, 1994, in Parowan, Utah, and the above-named Defendant, KIM W. MICHAM, having appeared before the Court in person together with his attorney of record, Andrew Berry, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having reviewed the file in detail and thereafter having heard statements from the Defendant, his attorney, and the Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation, to wit:

COPY

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, KIM W. MICHAM, has been convicted upon his plea of guilty to the offense of ASSAULT a Class B Misdemeanor, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown ~~or appearing to the Court~~ it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, KIM W. MICHAM, and pursuant to his conviction of ASSAULT, a Class B Misdemeanor, is hereby sentenced to a term of incarceration in the Iron County jail for period of thirty days (30) and the Defendant is hereby placed in the custody of the Utah State Department of Corrections.

IT IS FURTHER ORDERED that there shall be no fine.

STAY OF EXECUTION

IT IS HEREBY ORDERED that the execution of the term of imprisonment imposed and the fine imposed in this case are hereby stayed, pending the Defendant's strict adherence to and compliance with the following terms of probation.

ORDER OF PROBATION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, KIM W. MICHAM, is hereby placed on probation for a period of twelve (12) months, under the supervision of the Court (Bench Probation) strictly within the following terms, provisions, and conditions:

1. That the Defendant shall commit no law violation during the period of this

probation.

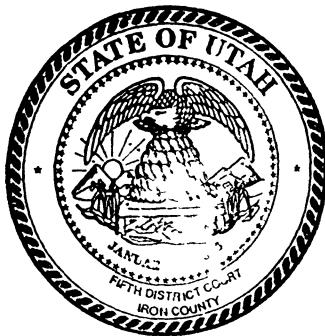
2. That the Defendant shall pay a fine in the sum and amount of one three hundred dollars (\$300.00).

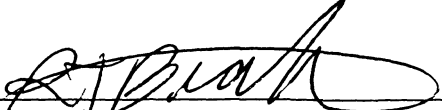
3. That the Defendant shall enroll in and complete a mental health evaluation (within 45 days) and thereafter shall pay for and successfully complete any program recommended pursuant to the evaluation.

4. That the Defendant shall have no contact, direct or indirect with victim Christine Langston.

5. That the matter shall be set for review on October 24, 1995.

DATED this 15 day of November, 1994.



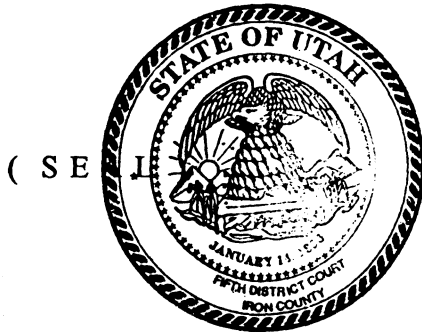

ROBERT T. BRAITHWAITE
District Court Judge

CERTIFICATE

STATE OF UTAH)
 'ss
COUNTY OF IRON)

I, LINDA WILLIAMSON, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true, and exact copy of the original Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation in the case entitled State of Utah vs Kim W Micham, Criminal No. 941500733, now on file and of record in my office

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of
Utah, this 16th day of November, 1994.



LINDA WILLIAMSON

LINDA WILLIAMSON
District Court Clerk

By: Jamara A. Carter
Deputy District Court Clerk



IRON COUNTY ATTORNEY

97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720



Andrew Berry
Attorney at Law
P.O. Box 600
Moroni, UT 84646



STATE OF UTAH,

v.

KIM W. MECHAM,

ORDER

Case Number: 941500733

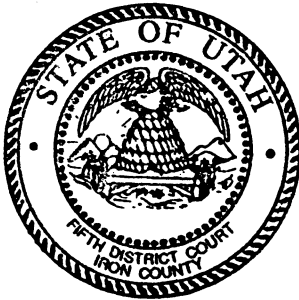
Based upon the information received by the court from Dr. Roby as disclosed on the record, and the information set forth in Dr. Roby's letter of October 24, 1995 which is a part of this file, the court finds that: (1) defense counsel made misrepresentations to the court concerning ISAT and (2)

in any event, defendant had not completed his mental health counseling by October 24, 1995 as required.

Accordingly, the court enters the following order which would have been entered October 24, 1995 had the misrepresentations not been made, to wit:

IT IS HEREBY ORDERED that the probation of defendant, Kim Mecham, be revoked for failure to complete mental health counseling, and the defendant is ordered committed to the Iron County Jail for a period of 30 days pursuant to the original judgement of the court.

DATED this 19 day of December, 1995.



R. T. Braithwaite
JUDGE ROBERT T. BRAITHWAITE
Fifth District Court

MAILING CERTIFICATE

I hereby certify that on this 19th day of December, 1995, I mailed a copy of the above and foregoing to the following:

Iron County Attorney
P. O. Box 428
Cedar City, Utah 84720

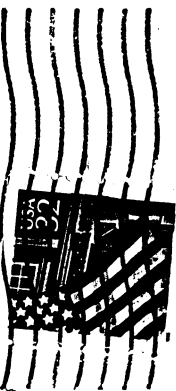
Andrew B. Berry
3540 South 4000 West
Suite 400
West Valley City, UT 84120

Iron Co. Correctional Facility
2136 N. Main
Cedar City, UT 84720

Lori Jones
Deputy Court Clerk

Fifth District Court

40 North 100 East
Cedar City, Utah 84720



*Andrea Berry
P.O. Box 600
Mojave, ut*

84646-0600

SCOTT M. BURNS (#4283)
Iron County Attorney
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P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694
Telecopier: (801) 586-2737

5th Judicial District Court – Iron County

F I L E D

JAN 04 1996

 CLERK
 DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,)	ORDER SETTING ASIDE STAY OF
)	EXECUTION OF SENTENCE, ORDER
Plaintiff,)	REVOKING PROBATION, ORDER OF
)	RESTITUTION, AND COMMITMENT
vs.)	
KIM W. MICHAM,)	Criminal No. 941500733
)	
Defendant.)	Judge Robert T. Braithwaite

The Defendant, KIM W. MICHAM, having entered a plea of no contest to the offense of Assault, a Class B Misdemeanor, on November 7, 1994, and the Court having accepted said plea of no contest and thereafter having sentenced the Defendant on November 7, 1994, in Parowan, Utah, to thirty (30) days in the Iron County Jail, said sentence having been stayed pursuant to specific terms and conditions of probation (see Exhibit 1 attached hereto and incorporated herein by this reference), said probation including terms that the Defendant shall enroll in and complete a mental health evaluation (within forty-five days) and thereafter shall pay for and successfully complete any program recommended pursuant to the evaluation (condition #3 of probation). The Court further ordered that the case be reviewed on October 24, 1995.

On October 24, 1995, the Defendant appeared before the above-entitled Court, together with attorney of record, Andrew B. Berry Jr., and the Defendant's attorney represented to the Court that

the Defendant had complied with all terms and conditions of probation and the case should be closed. The Court continued the matter for two (2) weeks to allow time to determine whether or not the Defendant did, in fact, successfully complete the counseling program with Dr. Carlos Roby, ISAT. The case was continued until December 5, 1995, and at the Defendant's request, was again continued until December 19, 1995, in Cedar City, Utah, at which time the above-named Defendant appeared in Court together with attorney Andrew B. Berry Jr. The Court accepted a letter from Dr. Carlos Roby therein stating that (a) the Defendant underwent an evaluation but refused to pay the \$700 fee and (b) Dr. Roby recommended a full treatment program but the Defendant had not entered into the program or complied with any of the treatment recommendations. Moreover, the Court spoke with Dr. Carlos Roby directly and was informed that the Defendant did not complete the recommended treatment program. The Court determined that the Defendant had not provided sufficient proof to the Court that he had complied with condition #3 of his probation, specifically that he had not paid for and successfully completed any program recommended pursuant to the evaluation.

Based upon the foregoing, the Court now makes and enters the following Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment as follows, to wit:

ORDER SETTING ASIDE STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the stay of execution of sentence previously ordered by the Court should be, and hereby is, set aside and revoked.

ORDER REVOKING PROBATION

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's probation should be, and hereby is, revoked pursuant to the Defendant's failure to abide by condition #3 of his

probation, specifically that the Defendant did not “pay for and successfully complete any program recommended pursuant to the evaluation.”

ORDER OF RESTITUTION

IT IS FURTHER ORDERED that the Defendant shall pay restitution to Dr. Carlos Roby in the amount of seven hundred dollars (\$700), plus interest, for costs and fees associated with the Defendant’s evaluation. The Defendant’s failure to pay restitution as ordered by the Court shall be treated as contempt of court with appropriate sanctions therefor.


COMMITMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, KIM W. MICHAM, shall be committed to the Iron County Jail for a period of thirty (30) days, there to be held pursuant to the foregoing Order Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment.

DATED this 29 day of December, 1995.



BY THE COURT:


ROBERT T. BRAITHWAITE
District Court Judge

CERTIFICATE

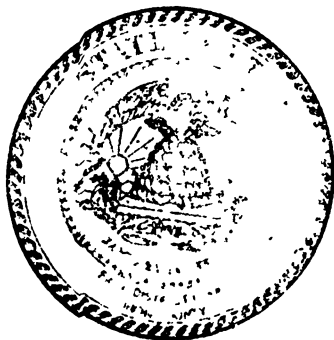
STATE OF UTAH)
 :ss.
COUNTY OF IRON)

I, LINDA WILLIAMSON, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true, and exact copy of the original Order

Setting Aside Stay of Execution of Sentence, Order Revoking Probation, Order of Restitution, and Commitment in the case entitled State of Utah vs. Kim W. Micham, Criminal No. 941500733, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 4th day of January, 1995.

(SEAL)



LINDA WILLIAMSON

LINDA WILLIAMSON
District Court Clerk

By: Janara A. Carter
Deputy District Court Clerk



IRON COUNTY ATTORNEY

97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720



MR ANDREW B BERRY JR
ATTORNEY AT LAW
P O BOX 600
MORONI UT 84646-0600



IFTH DISTRICT COURT (IRON)

THURSDAY FEBRUARY 1, 1996

2:36 PM

efendant

Reference:

COA Case: 941500733 FS

MECHAM, KIM W

State Felony

Judge: ROBERT T BRAITHWAITE

OTN #: 00623989

argesBail

Violation Date: 09/01/94

1. SIMPLE ASLT

76-5-102

.00

Sev: MB

roceedings

01/01/94 Case filed on 09/01/94.

ARR scheduled for 9/ 1/94 at 1:16 P in room U with RTB

Hearing (FEL FIRST APPEARANCE): JUDGE: ROBERT T BRAITHWAITE

TAPE: I5601 COUNT: 256

ATD: Deft pro se

PRO: None Present

Deft Present and pro se

DEFENDANT QUESTIONED FOR INDIGENCY. DEFENDANT APPOINTED THE

THE PUBLIC DEFENDER WITH POSSIBLE REIMBURSEMENT. KELVIN ORTON

IS SWORN AND TESTIFIED REGARDING PROBABLE CAUSE STATEMENT. BAIL

IS SET AT \$20,000. PRELIM TO BE SET WITHIN 10 DAYS.

FILED: PROBABLE CAUSE STATEMENT

/02/94 Notice of Setting

PRE scheduled for 09/09/94 at 0900 A in room U with RTB

FILED: NOTICE (PUBLIC DEFENDER)

/07/94 FILED: NOTICE OF CHANGE IN HEARING TIME

PRE rescheduled to 9/ 9/94 at 1:30 P in room U with RTB

/08/94 941550007 Bail bond posted 20000.00

Posted by: AA ROCKY MOUNTAIN BAIL BONDS

466 SOUTH 500 EAST

SALT LAKE CITY UT 84102

FILED: UNDERTAKING OF BAIL

CASES WILL NOT BE ABLE TO BE HEARD AS RESCHEDULED DUE TO THE

JUSTICE COURT NEEDING THE COURTROOM ALL DAY.

PRE rescheduled to 9/12/94 at 1:30 P in room U with RTB

FILED: NOTICE OF CHANGE IN HEARING DATE AND TIME

/12/94 PRE: TAPE I-5-603, BEGIN 702. KYLE LATIMER AND JAMES PARK ARE
PRESENT; THE DEFENDANT IS NOT. MR. LATIMER STATES THE DEFEN-
DANT BAILED OUT AND REQUESTS THAT A WARRANT BE ISSUED FOR
FAILURE TO APPEAR. (716) MR. PARK STATES HE HAS NO ADDRESS
FOR THE DEFENDANT AND REQUESTS A 1 WEEK CONTINUANCE TO GET
MORE INFORMATION. CONTINUANCE IS GRANTED UNTIL SEPTEMBER
20TH AT 1:30 P.M. THE CLERK IS TO NOTIFY AA ROCKY MOUNTAIN
BAIL BONDS.

C.TAC TALKED TO HELEN GLEAVE WITH AA ROCKY MOUNTAIN BAIL BONDS
AND LET HER KNOW THAT THE DEFENDANT DID NOT SHOW UP FOR COURT
AND THAT HIS PRELIMINARY HEARING WAS RE-SCHEDULED FOR SEPT.
20TH AT 1:30 P.M.

/13/94 FILED: RETURN OF SERVICE AND SUBPOENA (DEP. STEVEN CANTONWINE)

FIFTH DISTRICT COURT (IRON)

THURSDAY FEBRUARY 1, 1996

2:36 PM

Defendant
MECHAM, KIM W

Reference:

COA Case: 941500733 FS
State Felony

9/13/94	(NICHOLE SMITH)	TAC
	(CHRISTY LANGSTON)	TAC
	FILED: OFFENSE TRACKING FORM	GEK
9/14/94	Notice of Setting	TAC
	PRE scheduled for 09/20/94 at 0130 P in room U with RTB	TAC
9/15/94	FILED: APPEARANCE OF COUNSEL (ANDREW BERRY)	GEK
	FILED: MOTION FOR DISCOVERY	GEK
9/19/94	J.RTB GRANTED STIPULATED MOTION TO CONTINUE THE PRELIM AS SET	SSB
	FOR 09/20/94. ORDER NEEDS TO BE SUBMITTED. CASE IS TO BE	SSB
	SET FOR 1 DAY PRELIMINARY HEARING.	SSB
9/23/94	FILED: ORDER FOR DISCOVERY (UNSIGNED BY JUDGE BRAITHWAITE)	TAC
0/12/94	Notice of Setting	SSB
	PRE scheduled for 11/07/94 at 1000 A in room D with RTB	SSB
0/27/94	FILED: RETURN OF SERVICE ON SUBPOENA: SERG MICHAEL FISHER	GEK
	OFFICER KELVIN ORTON	GEK
0/28/94	FILED: RETURN OF SERVICE ON SUBPOENA: CHRISTY LANGSTON	GEK
	FILED: RETURN OF SERVICE ON SUBPOENA: NICHOLE SMITH	GEK
	DEPUTY STEVEN CANTONWINE	GEK
1/07/94	CREATE Trust A/R # 01 Other Trust Category	300.00 GEK
	941940006 Trust Pmt - Other A/R #01	300.00 GEK
	FINE PAYMENT	GEK
	FILED: RETURN OF SERVICE ON SUBPOENA: OFFICER JERRY WOMACK	GEK
	Charge 76-5-402 Sev F1 was amended to 76-5-102 Sev MB	TAC
	Sentence:	TAC
	Deft present with Counsel, Prosecutor present	TAC
	ATD: BERRY, ANDREW B PRO: BURNS, SCOTT M	TAC
	Tape: I5-635 Count: 369	TAC
	Judge: ROBERT T BRAITHWAITE	TAC
	Chrg: ASLT Plea: No Contest Find: Nolo Contem	TAC
	Fine Amount: 300.00 Suspended: .00	TAC
	Jail: 0 to 30 Suspended: 30	TAC
	Chrg: ASLT Plea: No Contest Find: Nolo Contem	TAC
	Fine Amount: 300.00 Suspended: .00	TAC
	Jail: 0 to 30 Suspended: 30	TAC
	Fines and assessments entered: FS	162.17 TAC
	SB	137.83 TAC
	Total fines and assessments...	300.00 TAC
	PRE: MR. BURNS STATES CHARGE WAS AMENDED TO ASSAULT A MISDE-	TAC
	MEANOR B. RECOMMENDATIONS ARE GIVEN FROM BOTH SIDES. THE	TAC
	DEFENDANT PLEADS NO CONTEST AND IS SENTENCED TO 30 DAYS JAIL	TAC
	WHICH IS SUSPENDED UPON PAYMENT OF A \$300 FINE TODAY AND	TAC
	UPON COMPLETION OF MENTAL HEALTH COUNSELING. THE DEFENDANT	TAC
	IS TO PROVIDE PROOF OF A SCHEDULED DATE FOR THAT COUNSELING	TAC
	WITHIN 45 DAYS. THE DEFENDANT IS ORDERED TO HAVE NO CONTACT	TAC
	WITH KRISTY LANGSTON. A REVIEW IS SCHEDULED FOR 10/24/95 AT	TAC
	10:30 A.M.	TAC
	FILED: AMENDED INFORMATION	TAC
./08/94	FILED: RETURN OF SERVICE OF SUBPOENA: DEP CHUCK MITCHELL	GEK
	DEP JAMES GREEN	GEK
./16/94	FILED: JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE, AND	TAC
	ORDER OF PROBATION (SIGNED BY JUDGE BRAITHWAITE)	TAC
./13/94	Notice of Setting	TAC

FIFTH DISTRICT COURT (IRON)

THURSDAY FEBRUARY 1, 1996

2:36 PM

Defendant

Reference:

COA Case: 941500733 FS

MECHAM, KIM W

State Felony

2/13/94 REV scheduled for 10/24/95 at 1030 A in room 1 with RTB TAC
1/11/95 FILED: NOTICE RETURNED THROUGH THE MAIL TAC
1/17/95 950090010 #01 Other pymt from Trust CHK #:010012 300.00 PMA
1/18/95 950100016 Fine payment in full 300.00 TAC
3/10/95 950440027 Bail bond exonerated 20000.00 GEK
FILED: PAPER EXONERATING BAIL GEK
0/24/95 REV: TAPE 102495, BEGIN 110400. SCOTT BURNS, ANDREW BERRY AND TC1
THE DEFENDANT ARE PRESENT. MR. BURNS ASKS THAT THE CASE BE TC1
CONTINUED FOR 1 WEEK. MR. BERRY ARGUES. JUDGE STATES HE TC1
WILL CALL THE COUNSELOR TO SEE IF COUNSELING IS COMPLETED. TC1
CASE IS CONTINUED FOR 2 WEEKS UNTIL NOVEMBER 7, 1995 AT TC1
10:30 A.M. TC1
Notice of Setting TC1
REV scheduled for 11/07/95 at 1030 A in room 1 with RTB TC1
1/02/95 FILED: NOTICE OF HEARING RETURNED THRU MAIL PKD
1/06/95 ATTY BERRY PHONED AND ASKED FOR CONTINUANCE TO 12/5 OF REVIEW, LAJ
THE COURT GRANTS REQUEST. LAJ
1/07/95 Notice of Setting LAJ
REV scheduled for 12/05/95 at 1030 A in room 1 with RTB LAJ
1/30/95 REV rescheduled to 12/ 5/95 at 10:29 A in room 1 with RTB LAJ
2/04/95 ATTY BERRY PHONED AND STATED HIS WIFE HAS BEEN PUT IN THE CAW
HOSPITAL - HE HAS NO WAY TO FAX A MOTION AND REQUESTS THIS CAW
MATTER BE CONTINUED. HIS NUMBER IS 436-8200 HE WILL TRY TO CAW
PHONE THE JUDGE TOMORROW MORNING CAW
2/05/95 REV: TAPE 120595, BEGIN 092428. SCOTT BURNS IS PRESENT, BUT TC1
ANDREW BERRY AND THE DEFENDANT ARE NOT. CASE IS CONTINUED TC1
UNTIL 12-19-95 AT 9:00 A.M., AS DEFENSE COUNSEL'S WIFE IS TC1
IN THE HOSPITAL. TC1
Notice of Setting TC1
REV scheduled for 12/19/95 at 0900 A in room 1 with RTB TC1
2/12/95 FILED: NOTICE RETURNED THROUGH THE MAIL TAC
2/14/95 ANDREW BERRY CALLED AND WAS NOTIFIED OF REVIEW HEARING ON KDP
12-19-95 BY PHONE. KDP
2/19/95 REV: TAPE 121995, BEGIN 091300. SCOTT BURNS, ANDREW BERRY AND TC1
THE DEFENDANT ARE PRESENT. CASE IS PASSED TO THE END OF THE TC1
CALENDAR. TC1
REV: 944A- THE COURT PLAYS THE VIDEO OF 10/24/95. COUNSEL LJ1
ARGUE THE MATTER OF IF/WHEN MENTAL HEALTH COUNSELING WAS LAJ
COMPLETED. THE COURT ORDERS THE DEFENDANT COMMITTED TO THE LJ1
IRON COUNTY JAIL TO SERVE 30 DAYS. DEFENDANT FURTHER ORDERED LJ1
TO PAY ALL COSTS ASSOCIATED WITH COUNSELING, TO I.S.A.T., LJ1
WITHIN 6 MONTHS TIME. LJ1
FILED: LETTER TO SCOTT BURNS FROM DR. C.Y. ROBY LJ1
***JAIL (RICK) NOTIFIED OF TERMS LJ1
FILED: ORDER LAJ
2/27/95 FILED: ORDER SENT TO ATTY BERRY RETURNED- "NOT AT THIS ADDRESS" LAJ
1/03/96 ***ORDER RESENT TO ATTY BERRY AT BOX 600, MORONI, UT LAJ
1/04/96 FILED: ORDER SETTING ASIDE STAY OF EXECUTION OF SENTENCE, ORDER TAC
REVOKING PROBATION, ORDER OF RESTITUTION, AND COMMITMENT TAC
(SIGNED BY J.RTB 12-29-95) TAC
2/01/96 Accepted distribution CF \$ 3.00 from Misc. Payments screen TAC

D O C K E T

IFTH DISTRICT COURT (IRON)

THURSDAY FEBRUARY 1, 1996
2:36 PMDefendant

Reference:

COA Case: 941500733 FS
State Felony

MECHAM, KIM W

Accounting Summary

	Total Due	Paid	Credit	Balance	Time Pay#
Paid in full	300.00	300.00			
A/R Type:	Total Due	Received		Paid	Balance
Other Trust # 01	300.00	300.00		300.00	
Trust Account	Posted	Applied	Refunded	Payable	
	20000.00		20000.00		NON-CASH

Additional Case DataSentence Summary

1. ASLT		Plea: No Contest	Find: Nolo Contendre
Fine amount:	300.00	Suspended:	.00
Jail: 30 DA		Suspended: 30 DA	

Parties

Prosecuting Attorney

BURNS, SCOTT M
97 NORTH MAIN, #22
P O BOX 428
CEDAR CITY UT 847200000

Home Phone: () -
Work Phone: (801) 586-6694

Dep Prosecuting Atty

LATIMER, KYLE D
97 NORTH MAIN, #22
P O BOX 428
CEDAR CITY UT 84720

Home Phone: () -
Work Phone: (801) 586-6694

Payor

AA ROCKY MOUNTAIN BAIL BONDS
466 SOUTH 500 EAST
SALT LAKE CITY UT 84102

Work Phone: () -

Atty for Defendant

BERRY, ANDREW B
3540 SOUTH 4000 WEST
SUITE 400
WEST VALLEY CIT UT 841200000

Home Phone: () -
Work Phone: () -

FTH DISTRICT COURT (IRON)

THURSDAY FEBRUARY 1, 1996
2:36 PM

fendant
MECHAM, KIM W

Reference:

COA Case: 941500733 FS
State Felony

Personal Description

Sex: M DOB: 01/27/59

Dr. Lic. No.:

State: UT **Expires:**

Scheduled Hearing Summary

ARRAIGNMENT	on 09/01/94	0116 P in room U with RTB
PRELIMINARY HEARING	on 09/12/94	0130 P in room U with RTB
PRELIMINARY HEARING	on 09/20/94	0130 P in room U with RTB
PRELIMINARY HEARING	on 11/07/94	1000 A in room D with RTB
REVIEW HEARING	on 10/24/95	1030 A in room 1 with RTB
REVIEW HEARING	on 11/07/95	1030 A in room 1 with RTB
REVIEW HEARING	on 12/05/95	1029 A in room 1 with RTB
REVIEW HEARING	on 12/19/95	0900 A in room 1 with RTB

End of the docket report for this case.